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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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March 19, 1979

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The Appellant Properly Raised in the Court Below the Due Process and Commerce Clause Challenges to the Vermont Tax Relied on Before This Court.

(a)

The appellee contends that because the appellant did not appeal to the Vermont Supreme Court from the decision of the Washington Superior Court in its favor, it is now precluded from challenging the tax at issue under the Due Process Clause.

This argument is without merit and is not supported by any case cited by the appellee. Most of the cases cited merely hold that an appellant to the Vermont Supreme Court must file a timely notice of appeal to give that court

appellate jurisdiction. (See cases, Appellee's St. pp. 10-11). The three cases that do not fall in that category all involved appeals by the party that had lost below, and hold that the appeal of the losing party must be confined to the issues "raised by the brief of the appellants." (*In re: Smith, Bell & Hauck Real Estate Inc.*, 132 Vt. 295, 300, 318 A.2d 183, 187 [1974]; *Tellarico* v. *Brett*, [decision handed down February 6, 1979]; *In re: Wright*, 131 Vt. 473, 490, 310 A.2d 1, 10 [1973]).

The established Vermont law is that a litigant that has obtained a judgment below for all the relief it seeks cannot appeal. Thus, in *Thompson* v. *Smith*, (119 Vt. 488, 129 A.2d 638 [1957]), the court held that "[a] party may not appeal from a decree in his favor for the purpose of obtaining a review of a finding he deems erroneous which is not necessary to support any part of the decree made by the Chancellor." (119 Vt. at 511, 129 A.2d at 652; *accord*, *Hall* v. *Hall*, 124 Vt. 410, 206 A.2d 786 [1965]; *Lane Construction Corp.* v. *State*, 127 Vt. 287, 248 A.2d 508 [1968], appeal after remand, 128 Vt. 421, 265 A.2d 441 [1970]; *Milne* v. *Capital City Gas Co.*, 129 Vt. 308, 276 A.2d 632 [1971]).

The prevailing party, may, nevertheless, on appeal by the losing party, urge any ground on the appeal in support of the Superior Court's decision in its favor. (*Horicon* v. *Langlois' Estate*, 115 Vt. 81, 52 A.2d 888 [1947]; *Goupiel* v. *Grand Trunk Ry. Co.*, 94 Vt. 337, 111 A. 346 [1920]; see *Sexton* v. *Greer*, 135 Vt. 343, 376 A.2d 750 [1977]; *Braune* v. *Town of Rochester*, 126 Vt. 527, 237 A.2d 117 [1967]).

In the instant case, the Superior Court held that the inclusion by the Commissioner of Taxes, for apportionment purposes, of appellant's foreign source dividends was unconstitutional, because "such income could be the subject of prohibitive multiple taxation" (Jur. St., App. B, pp. 15a-16a). In the final order from which the Commissioner

appealed to the Vermont Supreme Court, all of appellant's foreign source dividends were eliminated from the tax as recomputed in accordance with the decision of the Superior Court. (Id., App. B, pp. 17a-17b). Consequently, on the appeal to the Vermont Supreme Court, the appellant (as appellee before that court) was entitled under the Vermont law to make any contention that might support that decision, including the contention that the inclusion of the foreign source dividends in the tax base for apportionment purposes would contravene the Due Process Clause of the 14th Amendment.

In point of fact, in presenting its case to the Vermont Supreme Court, the appellant cited in support of the judgment of the Superior Court both the Due Process and Commerce Clause challenges to the validity of the tax on which it here relies in its Jurisdictional Statement. The facts relevant to the raising of the Due Process issue are set out in the Jurisdictional Statement, p. 3.

(b)

The appellee concedes that the appellant challenged the tax under the Commerce Clause before the Vermont Suprem Court, and that that court passed on the question as to whether "Vermont's application of its apportioned net income tax to the investment income at issue constitute multiple taxation prohibited by the Commerce Clause". (Appellee's St., p. 14.). Since most of the "investment income" consisted of dividends derived from foreign sources (Jur. St. p. 5), there can be no question that the appellant argued before the Vermont Supreme Court that the tax on its foreign source dividends violated the Commerce Clause, or that its contention was rejected by that court. Appellee's contention, therefore, comes down to the narrower, highly strained argument that, because the Superior Court, in

setting aside the tax as violating the Commerce Clause "attributed no constitutional significance to the foreign source of the earnings from which the dividends were paid", (Appellee's St. p. 13), and the appellant did not appeal the decision in its favor, we are not now in a position to make a Commerce Clause argument before this Court that gives constitutional significance to the foreign source of the dividends.

The Vermont cases cited above clearly establish that the appellant, as the winning litigant, was not required to and, indeed, could not appeal to the State Supreme Court the grounds on which the foreign dividend issue was decided in its favor. On the Commissioner's appeal, however, as permitted by the State's law, the appellant did argue in the Vermont Supreme Court that the foreign source character of the dividends taxes had "constitutional significance", to use appellee's term, under the Commerce Clause. Point B-4 of appellant's brief in the Vermont Supreme Court (there the appellee) made the following contention:

> 4. Because the dividends at issue were paid by corporations that conducted their business and derived virtually all their income from foreign sources, the risks of multiple taxation of the dividends are increased in the case at bar, in contravention of the Foreign Commerce Clause. (Br. p. 18).

Accordingly, in reversing the Superior Court and holding that the Commerce Clause was not violated by the imposition of the tax on the appellant's dividends derived from foreign sources, the Vermont Supreme Court necessarily rejected that contention. Hence, both the Due Process and Commerce Clause questions presented to this

Court in the Jurisdictional Statement were properly raised by appellant before the Vermont Supreme Court and were passed on by that tribunal.

CONCLUSION

The motion to dismiss or affirm should be denied and probable jurisdiction of the appeal should be noted by this Court.

Dated: March 19, 1979

Respectfully submitted,

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